80-923

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO._____

FILED
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MICHAEL RODAK, JR., CLERK

ROBERT GLENN MOORE,
MICHAEL ENGLISH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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ROBERT GLENN MOORE,
MICHAEL ENGLISH,

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vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the search to which petitioners were subjected was conducted at the functional equivalent of the border so as to be characterized as an extended border search.

2. Whether the five and one-half (5 1/2) hour forcible detention of petitioners constituted a de facto arrest requiring the giving of Miranda warnings to petitioners prior to questioning.

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REFERENCE TO OPINION BELOW

On August 14, 1980, the United States Court of Appeals for the Ninth Circuit filed an Opinion affirming petitioners' convictions. On October 22, 1980, petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was denied by that Court. Copies of the Opinion and Order are attached hereto as Appendix "A" and "B", respectively.

The Opinion was certified for publication. However, it has not yet appeared in print in the Federal Reporter, Second Series, and, therefore, petitioners do not yet have a citation for it.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Ninth Circuit, was filed and entered on August 14, 1980. A timely Petition for Rehearing and Suggestion for Rehearing En Bank was denied on October 22, 1980. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment due process clause:

"No person shall . . . be deprived of live, liberty, or property, without due process of law . . ."

18 U.S.C. § 371, in pertinent part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

31 U.S.C. § 1101(a), in pertinent part:

> ". . . whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowlingly--
> (1) transports or causes to be transported monetary instruments--
> (A) from any place within the United States to or through any place outside the United States, or
> (B) to any place within the United States from or through any place outside the United States, or
> (2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States
>
> in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section."

STATEMENT OF THE CASE

On January 5, 1979, petitioners MOORE and ENGLISH were forcibly detained at Palomar Airport, a facility designed for small aircraft located in north San Diego County, near Carlsbad, California. Petitioners were leaving the airport in a taxi cab when Carlsbad Police officers, guns drawn, stopped the cab. Petitioners were then detained for twenty (20) minutes in the rear of a caged police vehicle while waiting for United States Customs Officers to arrive from San Diego.

Petitioners were stopped and detained based upon a radar sighting of what was alleged to be

petitioners' aircraft. Respondent here, the United States, alleged that the aircraft was sighted in Mexican airspace on a superimposed, video display map on the radar screen depicting the international border. Petitioners stipulated that a witness from San Diego Aircraft Approach Control, if called, would testify that he had read a Federal Aviation Administration manual which stated the accuracy of the map. No stipulation was entered into regarding the accuracy of the map. Nor was any competent evidence admitted on that issue. Petitioners' hearsay objection and objection to the competency of any such testimony was overruled, the trial judge stating that the objection went to the weight, not the admissability of the evidence.

Customs officers, upon arrival, asked petitioners if they had anything to declare from Mexico. Petitioners responded that they had not been into Mexico. The customs officers then searched petitioners' luggage, person and aircraft. Twenty thousand dollars ($20,000) in cash was found in petitioner MOORE's luggage. Marijuana debris was found in the aircraft.

While the aircraft and luggage were searched, petitioners were detained in the airport manager's office. The currency was found within sixty (60) seconds of arrival in the office. They remained detained there for an additional five (5) hours. Despite questioning, at no time during this period were petitioners informed of their constitutional rights per Miranda. Nor were they free to leave.

Five and one-half (5 1/2) hours after their forcible detention and de facto arrest, petitioners were placed under arrest and warned per Miranda. The intervening time had been spent in investigation and interrogation of petitioners.

Upon stipulated facts, petitioners were found guilty of conspiracy in violation of 18 U.S.C. § 371 (Conspiracy to commit offense or to defraud United States) and violation of 18 U.S.C. § 1001 (Statements or entries generally). Additionally, petitioner MOORE was convicted of a currency charge in violation of 31 U.S.C. § 1101. The False statements and the currency were discovered after petitioners' detention and prior to Miranda warnings.

ARGUMENT

I

NO COMPETENT EVIDENCE OF PETITIONERS' INTERNATIONAL BORDER CROSSING WAS INTRODUCED. THEREFORE, THE NINTH CIRCUIT'S RELIANCE ON THE EXTENDED BORDER SEARCH RATIONALE IN UPHOLDING THE SEARCH OF PETITIONERS' AIRCRAFT AND LUGGAGE WAS ERRONEOUS.

A. It is fundamental that "[i]n order to support a conclusion that a search occurred at the functional equivalent of a border" there must be "articulable facts to support a reasonable certain conclusion" that the vessel has in fact crossed the border and entered the United States. United States v. Potter, 552 F.2d 901, 907 (9th Cir. 1977) quoting from United States v. Tilton, 534 F.2d 1363, 1366 (9th Cir. 1976).

Customs officials are not at liberty to search every vessel or vehicle which lands or arrives near the international border. Before a border search can be justified there must be "articulable facts" to support the conclusion that the vessel is arriving from outside the United States. The same is true in searches at the border's functional equivalent.

> "In Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.ED.2d 596 (1973), the Supreme Court held that the great latitude allowed for searches at the border also extends to the border's functional equivalents. The Court gave as one example of searches at the functional equivalent of the border "a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City . . ." [citation]
>
> "That the St. Louis airport is a functional equivalent of the border does not mean that customs agents may search every plane which lands there. Customs agents do not have carte blanche authority to search aircraft arriving from points within the United States merely because nonstop flights from foreign countries also land there. An airport is a functional equivalent of the border only with respect to those airplanes arriving from outside the United States.
>
> United States v. Solmes, 527 F.2d 1370, 1372 (9th Cir. 1975).

Assuming, arguendo, the radar sighting of petitioners' aircraft was sufficient evidence to establish their presence approximately 15 miles into Mexican airspace (see discussion infra), that sighting did not establish that petitioners were arriving from outside the United States.

The Ninth Circuit opinion relies on United States v. Potter, 552 F.2d 901 (9th Cir. 1977) to support its conclusion that a legal search at the

functional equivalent of the border took place here. The facts in Potter are distinguishable. The basis for the search there was the observance by U.S. Customs agents of Potter's aircraft as it took off from El Paso International Airport and flew towards Mexico. The aircraft was then followed 150 miles into Mexican airspace. Customs agents calculated the time it would take Potter's plane to reach its projected destination in Mexico and return to the United States. Subsequently, the aircraft was detected returning from Mexico when it was about 53 miles south of the border. Potter's aircraft was then followed as it crossed back into the United States and landed. Thus, it was observed leaving the United States, traveling at least 150 miles into Mexico and later returning from at least 53 miles south of the border.

Similarly, in United States v. Solmes, 527 F.2d 1370 (9th Cir. 1975), Solmes' boat was observed anchored off Puerto Santa Tomas, Mexico, 80 miles south of San Diego. The boat was subsequently observed in Mission Bay. See also United States v. Ingham, 502 F.2d 1287 (5th Cir. 1974)

(vessel actually seen in foreign port or place); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970) (automobile seen driving across the border from Mexico).

In United States v. Tilton, 534 F.2d 1363 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit remanded the case "for a post-conviction hearing on whether the boat came from foreign or international waters" 534 F.2d at 1365. Without such a finding the border search could not stand.

Here, petitioners were not spotted in Mexico. Rather, a disputed radar signting (see discussion infra) placed their aircraft 15 miles into Mexican airspace. There is no allegation that petitioners were actually in Mexico, merely that they may have crossed into Mexican airspace. Mere presence in foreign airspace without more is not enough to permit a search of the functional equivalent of the border.

B. In ruling that the search and seizure herein took place at the functional equivalent of the border, the Ninth Circuit Court of Appeals

has sanctioned the District Court's use of incompetent evidence.

The evidence used to establish that petitioners were in Mexican airspace was a superimposed, video display on the radar screen indicating the location of the international border.

Continuous surveillance from a point outside the United States to a point within the United States is a necessary predicate to the extended border search rationale. In order that the surveillance is continuous and accurate, the international border line must be defined accurately. Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970); Alexander v. United States, 362 F.2d 379 (9th Cir. 1966).

The standard of reasonable certainty of entry is a higher standard than that of probable cause. United States v. Kessler, 497 F.2d 277 (9th Cir. 1974).

> "Where, . . . a search . . . by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances including . . .

> the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States.

Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966).

The only evidence of surveillance and of the fact of an international border crossing was provided by the radar blip and the video map. In order to admit that scientific evidence, the principles upon which it is based must be sufficiently established to have gained general acceptance in the field to which it belongs. United States v. Brown, 557 F.2d 541 (6th Cir. 1977).

No demonstration of the accuracy, nor of the general acceptance in the field of the radar video map system was made. The only evidence about this radar video map was the statements of an Air Traffic Controller made to an investigator. The Traffic Controller's information came from a technical manual entitled, "Maintenance of Airport Surveillance Radar Indicator Site Equipment." That manual was not offered into evidence.

The statements made by the government investigator about what the Traffic Controller said about what the manual on radar video maps said were out of court statements offered for the truth of the matter asserted and, therefore, hearsay. Federal Rules of Evidence, rule 801(c), defines hearsay and controls its admissibility not the weight to be given the evidence as the District Court ruled.

Assuming that mere presence in Mexican airspace was sufficient to support the rationale for an extended border search, the evidence which purportedly established that presence was inadmissable hearsay and there was, therefore, no evidence to establish petitioners' presence in Mexico and subsequent border crossing.

II

THE OVER FIVE AND ONE-HALF (5 1/2) HOUR FORCIBLE DETENTION OF PETITIONERS CONSTITUTED A DE-FACTO ARREST REQUIRING THE GIVING OF MIRANDA WARNINGS TO PETITIONERS PRIOR TO QUESTIONING.

Petitioners were forcibly required, at gun point, to disembark from the taxi cab in which they were riding and wait in the rear caged area of a police vehicle. Such detention amounted to

more than a mere investigative stop and constituted a de facto arrest. Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979).

In United States v. Strickler, 490 F.2d 378 (9th Cir. 1974), that court found that the mere fact that the vehicle in which the defendants were riding was stopped and directed to the roadside by officers with weapons drawn was sufficient indicia of formal custody as to amount to a de facto arrest.

Last term, this Court, said:

> "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

United States v. Mendenhall, ____U.S.____, 100 S.Ct. 1870, 1877 (1980).

There can be no question that, in the instant case, petitioners were "seized" within the meaning

of the Fourth Amendment. They were not free to leave. A finding that the five and one-half hour detention here was a mere investigative stop directly conflicts with the decisions of this Court as well as decisions of the United States Court of Appeals for the Ninth Circuit. See, United States v. Mendenhall, supra; United States v. Chamberlin, 609 F.2d 1318 (9th Cir. 1979).

Following a de facto arrest and prior to any interrogation, procedural safeguards including Miranda warnings, must be followed. No such safeguards were followed here. All statements and evidence obtained pursuant to those statements is therefore tainted and must be disregarded.

Assuming, arguendo, that the detention here did amount to an extended border search, procedural safeguards were still required. Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir. 1969), held that Miranda warnings must be given to one entering the United States when the questioning agents have probable cause to believe that the person being questioned has committed an offense, or the person is arrested whether with or without

probable cause.

Here, the customs officers, if the Court finds the requisite criteria of an extended border search, had probable cause to believe that an offense, or offenses, had been committed. In order to justify the extended border search, the Court must find that the agents were reasonably certain that the plane entered the United States from Mexico. Alexander v. United States, supra; United States v. Potter, supra; United States v. Tilton, supra. This standard of reasonable certainty is higher than probable cause. United States v. Kessler, supra.

Therefore, when the statement by petitioners, "we have not been to Mexico," was made, the agents had probable cause to believe a false statement in violation of 18 U.S.C. § 1001 had been made. Thereafter, the officers discovered the currency and marijuana debris. Each of these facts, independently gave the officers probable cause to believe petitioners had committed a crime or crimes. Miranda warnings were required. They were not given. Petitioners

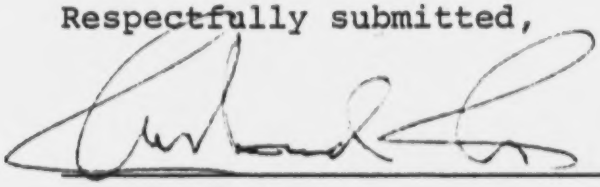
were detained and interrogated five and one-half hours. The evidence obtained during the time was tainted and should have been suppressed.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and the judgment and opinion of the United States Court of Appeals for the Ninth Circuit reviewed.

Dated: November 20, 1980

Respectfully submitted,



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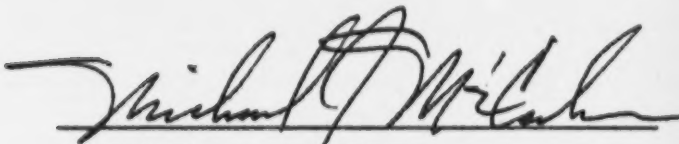

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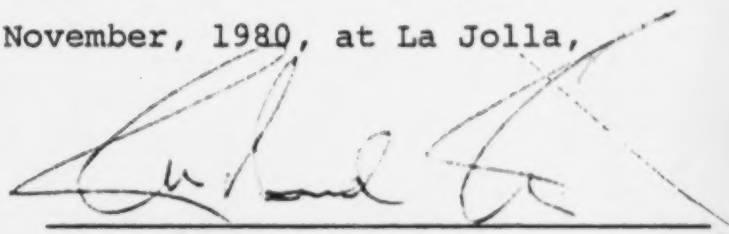
PROOF OF SERVICE

I, the undersigned say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within-mentioned mailing occurred, and not a party to the action. My business address is 5560 La Jolla Boulevard, Suite E, La Jolla, California 92037.

On November 20, 1980, I deposited in the U.S. mail, at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of PETITION FOR WRIT OF CERTIORARI FOR ROBERT GLENN MOORE AND MICHAEL ENGLISH, Petitioners, to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 20th day of November, 1980, at La Jolla, California.



J. WILLIAM BEARD, JR.

Filed in the Court of Appeals
Ninth Circuit
August 14, 1980

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT GLENN MOORE, Defendant-Appellant.	No. 79-1416 DC No. 79-0045 Criminal
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MICHAEL ENGLISH, Defendant-Appellant.	No. 79-1417 DC No. 79-0045 Criminal OPINION

Appeal from the United States District Court for the Southern District of California

Before: CHOY, ANDERSON and PREGERSON, Circuit Judges.

CHOY, Circuit Judge:

On stipulated facts, Moore and English were convicted of conspiracy and making false statements to customs officers, 18 U.S.C. § 1001; Moore was also convicted of bringing more than $5,000 cash into the country without reporting it,

31 U.S.C. § 1101. We affirm.

I. Statement of the Case

Experienced government agents manning a radar screen detected an unidentified object, apparently an aircraft, crossing from Mexico into the United States at approximately 200 miles per hour. One of the agents called the local airport it was nearing and specified its location; the control tower identified it as appellants' small airplane. The police were called. The plane landed; appellants emerged and got into a taxi. Policemen approached the taxi from behind with guns ready, but it started to drive off. The policemen raised their guns, and the taxi halted. Appellants were frisked and told, "We are just detaining you for customs, and this is a routine pat-down." They were then placed in the caged rear seat of a police car.

A few minutes later, customs officers arrived by plane and appellants were moved to the airport manager's office. Without giving Miranda warnings, a customs officer asked appellants if they had anything to declare from Mexico. They falsely replied that they had not been into Mexico, then

lied that they had come from New Mexico and had only been forced into Mexican airspace by bad weather. Officers made a warrantless search of appellants' airplane and luggage and found $20,000. The appellants were later given Miranda warnings and formally arrested.

II. Warrantless Search at the "Extended Border"

No warrant or probable cause is required for customs searches at the border. Shorter v. United States, 469 F.2d 61, 63 (9th Cir. 1972), cert. denied, 411 U.S. 918 (1973). The same is true of customs searches made at the functional equivalent of the border. United States v. Potter, 552 F.2d 901, 907 (9th Cir. 1977). The first United States point at which an international flight lands is the functional equivalent of the border. Id. Essentially continuous surveillance of a vehicle, or similar information that establishes to a reasonable certainty that it crossed the border and that any contraband found was aboard when the border was crossed, brings a case within this category of "extended border searches." See id.; Castillo-Garcia v. United States, 424 F.2d 482, 485 (9th Cir. 1970). The facts of this case

evince an even higher degree of certainty than that.

The government agents continuously and reliably tracked the radar blip that represented appellants' plane. They could not have confused it with any other aircraft represented on the radar screen. As the plane approached Palomar Airport, near Carlsbad, California, the agents learned from the Palomar control tower that the plane represented by the blip was appellants' twin-engine Aztec. The control tower then brought the Aztec in and watched appellants emerge.

The tower quickly corrected its initial confusion of the plane in question with a single-engine Cherokee that was nearer the airport. The agents continued to track the blip until the plane was in the Palomar landing pattern and its location and true identity had been confirmed by the tower. Moreover, the blip the agents had been tracking could not have represented the Cherokee, because a Cherokee cannot fly as fast as the tracked plane was flying. Thus, this momentary confusion did not vitiate the required reasonable certainty that the radar blip represented appellants' plane.

It is of course not necessary for customs agents actually to view the airplane crossing the border and proceeding into the United States. See United States v. Ingham, 502 F.2d 1287, 1290 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975). The reliable technology used by the agents in this case was more than acceptable. See United States v. Potter, 552 F.2d at 906-07.

To determine the location of objects that caused blips to appear on the radar screen, the agents relied on a National Oceanographic Service video map, showing the location of geographical features and international boundaries, that was superimposed on the radar screen. Proof that appellants' plane was in Mexico, crossed the border, and proceeded to Palomar depends in large part on the accuracy of the map. The map's accuracy was sufficiently proved by the testimony of an expert in radar and air traffic, and the FAA manual he based his opinion on did not have to be admissible itself. Fed. R. Evid. 703. Appellants' hearsay objection below concerned the expert's declaration regarding the manual, not (as they assert in their reply brief here) the

agent's declaration of the expert's statements. Appellants waived the latter hearsay objection below by stipulating that the expert be deemed to have been called, duly sworn and testified in accordance with the information he gave the agent.

We conclude that the search was made at the functional equivalent of the border, and that no warrant or probable cause was required.

III. Stop and Detention Without Probable Cause

Appellants claim that they were arrested without probable cause, and that all evidence subsequently obtained must be suppressed as the fruit of a poisonous tree. They were not arrested, however, but were subjected to a brief "forcible stop" designed to "maintain the status quo momentarily," Adams v. Williams, 407 U.S. 143, 146 (1972). If entrants such as appellants could not be stopped and briefly detained against their will pending customs officers' arrival and examination at the extended border, our customs laws could not be enforced. See Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("national self protection" permits entrants to be "stopped" at border to stem the flow of contraband);

United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) ("stops" necessary to enforce immigration laws). If reasonable suspicion to support this stop and detention was required, it was supplied by appellants' failure to report their entry and land at a designated airport for customs processing. Cf. United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (no individualized suspicion needed for stops at border checkpoints).

The policemen's show of force was precipitated by the action of the taxi driver, and was necessary to prevent the appellants from being driven away; it did not transform the stop into an arrest. See United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977) (policeman drew gun when van began to drive away), cert denied, 435 U.S. 914 (1978); United States v. Richards, 500 F.2d 1025, 1028-29 (9th Cir. 1974) (agent drew gun on airplane preparing to take off), cert. denied, 420 U.S. 924 (1975). See also United States v. Beck, 598 F.2d 497, 500 & n.1, 501 (9th Cir. 1979). Under the totality of the circumstances, the conduct of the police was reasonable. The policemen knew that appellants were suspected smugglers, and could not

be certain that they were unarmed. After appellants had been frisked, the policemen holstered their guns.

The police promptly and correctly informed appellants that, rather than being arrested, they were being detained for U.S. Customs. We have approved such detentions pending the arrival of specialized officers. See United States v. O'Looney, 544 F.2d 385, 389 (9th Cir.) (ATF agents), cert. denied, 429 U.S. 1023 (1976). Moreover, such verbal denial of arrest tends to disprove arrest. United States v. Richards, 500 F.2d at 1029.

The further detention of appellants after the customs officers arrived was, as a reasonable man would have understood, not an arrest but a typical administrative detention pursuant to a customs examination.

IV. Failure to Give Miranda Warnings

The false statements for which appellants were convicted were made without benefit of Miranda warnings. Government agents questioning an entrant at the border need not give Miranda warnings "unless and until the questioning agents have probable cause to believe that the person questioned

has committed an offense, or the person questioned has been arrested, whether with or without probable cause." Chavez-Martinez v. United States, 407 F.2d 535, 539 (9th Cir.), cert. denied, 396 U.S. 858 (1969). Since we hold that appellants were not arrested until after the statements challenged here were made, the issue is whether the questioning customs officer had probable cause.[1/]

When the customs officer first approached and began questioning appellants, there was no probable cause to believe that appellants had committed a crime. The officer could not have had probable cause to believe that appellants had violated 19 U.S.C. § 1459 (failure to report arrival of vehicle containing merchandise), because their airplane was not a "vehicle," see 19 U.S.C. § 1401(b), and he did not know whether appellants were carrying "merchandise" (in fact, they were not); therefore appellants' failure to

1/ The questioning here occurred as appellants stood outside the terminal building and in the airport manager's office; the situation itself was not so coercive or "police dominated" as, without more, to bring Miranda concerns into play. See United States v. Hickman, 523 F.2d 323, 326-27 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

report their arrival was not illegal. Even if the officer believed that appellants had violated the civil regulations promulgated under authority of 19 U.S.C. § 1624, these were not "crimes." See 19 C.F.R. & 6.11. And although conspiracy to violate those regulations is a crime, there was no probable cause to believe that the airplane's two occupants were conspiring, even if there was cause to believe that one occupant intended to and did violate the regulations. Therefore, the customs officer had no probable cause, and did not have to give Miranda warnings, when he arrived and directed his questions to appellants.

He first asked them if they had anything to declare from Mexico; they said that they had not been into Mexico. The officer contradicted them, and they replied that they had flown nonstop from Sunland Park, New Mexico, and had only veered into Mexican airspace to avoid a weather front.

Before, and even after, these statements, the officer did not yet have probable cause. A prudent man would not jump to the conclusion that appellants were liars and criminals; he would first determine whether they had a plausible explanation,

consistent with innocence (as in fact they claimed to). Although the officer may have been suspicious, he did not yet have facts and circumstances within his knowledge and of which he had reasonably trustworthy information sufficient to warrant a prudent man in believing that appellants had committed a crime. See United States v. Avalos-Ochoa, 557 F.2d 1299, 1302 (9th Cir.) (definition of probable cause), cert. denied, 434 U.S. 974 (1977). Therefore, appellants' fatal statements were made before probable cause arose.

V. Sufficiency of the Evidence

Appellants claim that their statements that they had not been into Mexico cannot be used to convict them under & 1001, because an answer of "yes" or silence to the question whether they had anything to declare would have tended to incriminate them; thus, they say, they were entitled to respond with an "exculpatory 'no.'" It is doubtful whether the "exculpatory 'no'" defense has any validity within this Circuit, see United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978); United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1976); United States v. Ratner, 464 F.2d 101, 103-

05 (9th Cir. 1972). We need not reach the issue, however, because appellants did more than merely say no, they had nothing to declare; they offered the affirmative, unsolicited statements that they had not been into Mexico and that they had flown from Sunland Park, New Mexico.

The stipulated facts amply demonstrate that these statements were false. The statements, if believed, would have enabled appellants and any contraband they might have been carrying to enter the contry without rigorous examination; thus they potentially impaired the function of the customs service and violated 18 U.S.C. § 1001. United States v. Rose, 570 F.2d at 1364.

VI. Conclusion

No warrant or probable cause was required for the search of appellants' airplane and luggage, because the search occurred at the "extended border." Because the detention of appellants was merely a permissible "stop," not an arrest, no evidence must be excluded. It was not necessary for Miranda warnings to precede the questions that elicited appellants' false statements. The evidence supported the convictions.

AFFIRMED.

PREGERSON, Circuit Judge, concurring specially:

The record satisfies me that the defendants' actions, taken after the airplane landed, justified the precautionary measures taken by the officers, although at first blush those measures seemed excessive. Because those measures were justified an arrest did not take place.

Therefore, I concur in the result.

Filed in the Court of Appeals
Ninth Circuit
October 22, 1980

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT GLENN MOORE, Defendant-Appellant.	No. 79-1416 DC No. 79-0045
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. MICHAEL ENGLISH, Defendant-Appellant.	No. 79-1417 DC No. 79-0045 ORDER

Before: CHOY, ANDERSON and PREGERSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.